(6)

No. 04-460

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,
Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF CROSS PETITIONERS

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REPLY BRIEF OF CROSS PETITIONERS

Cross-Petitioners submit this reply to the briefs in opposition of the Federal Respondents ("FCC Opp."), NCTA, *et al.* ("NCTA Opp."), and Earthlink *et al.* ("Earthlink Opp.").[1]

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[1] Federal Respondents' petition for writ of certiorari in No. 04-281 will be cited as "FCC Pet." The Appendix to that petition will be cited as "FCC App." The petition for writ of certiorari in No. 04-277, filed by NCTA, will be cited as "NCTA Pet."

I. If, as the Petition in No. 04-281 Correctly Contends, the Classification of Cable Modem Service Presents an Issue of Exceptional National Importance, Then the Cross Petition Does As Well.

In their petition in No. 04-281, Federal Respondents urged this Court to grant review because, *inter alia*, "the classification of cable modem service under the Communications Act presents an issue of exceptional national importance." FCC Pet. at 24. We agree. Cross Petition at 3. It is undisputed that one of those potential classifications -- explicitly recognized by this Court in the *Gulf Power* case,[2] by the Commission in its proceeding that culminated in this case,[3] by the Federal Respondents in No. 04-281 (FCC Pet. at 5-7), and by the cable petitioners in No. 04-277 (NCTA Pet. at 4) -- is that cable modem service is a "cable service" within the meaning of the Communications Act, 47 U.S.C. §§153(7) & 522(6). Federal Respondents cannot tenably claim that the classification issue is sufficiently important to justify review only if it is resolved the way they prefer. Review of the Cross Petition is therefore warranted.

1. Federal Respondents argue that there is no conflict among the circuits on the "cable service" issue warranting this Court's review (FCC Opp. at 8-9). But Federal Respondents' claim of a circuit conflict in their own petition

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[2] *NCTA v. Gulf Power*, 534 U.S. 327, 337-339 (2002); *id.* at 349-350 & n. 1 (Thomas & Souter, JJ, concurring in part and dissenting in part).

[3] *Internet over Cable*, Notice of Inquiry, 15 FCC Rcd 19287, 19293-294 (2000); *Internet over Cable*, Declaratory Ruling, 17 FCC Rcd 4798, 4818-39 (2002) ("*Declaratory Ruling*") (FCC App. at 86a-132a).

(FCC Pet. at 20-21) is itself weak,[4] and their petition is certainly not based solely, or even primarily, on that claim (FCC Pet. at 2-3, 15-19 & 24-28).

In any event, a circuit conflict is hardly the only justification for this Court's review. To the contrary, "an important question of federal law that has not been, but should be, settled by this Court" is grounds for review, Sup. Ct. Rule 10(c), and Federal Respondents have argued, and we agree, that the proper "classification of cable modem service under the Communications Act" is just such a question (FCC Pet. at 24). The "cable service" question is one over which the court of appeals below and a district court are in conflict.[5] More importantly, this conflict is the same one that two members of this Court noted in *Gulf Power*,[6] and the cable modem service classification question itself, including the possibility that cable modem service is a "cable service," was acknowledged by all members of the Court in *Gulf Power*.[7]

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[4] *See, e.g.*, Opposition Brief of Respondent Earthlink, Nos. 04-277 & 04-281, at 25-26; Brief of States and Consumer Groups in Opposition, Nos. 04-277 & 04-281, at 28-29.

[5] FCC Pet. at 10 & n.3; NCTA Pet. at 7-10; FCC Opp. at 8; Cross Petition at 7. *Cf. Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (certiorari granted because of "the importance of the questions presented and the conflicting views in the courts of appeals and the district courts").

[6] *Gulf Power*, 534 U.S. at 349-50 & nn. 1&2 (Thomas & Souter, JJ, concurring in part and dissenting in part).

[7] *Id.* at 337-38 (opinion of the Court).

2. Federal Respondents' argument (FCC Opp. at 9-10) that the Court can address the question concerning the interplay of *Chevron*[8] and *stare decisis* without granting the Cross Petition is misguided. The argument might make more sense if in their petition, Federal Respondents had asked the Court to address only the *stare decisis* issue and, assuming the Court were to agree that *Chevron* rather than *stare decisis* controls, left application of the *Chevron* standard for remand to the court of appeals. But that is not what Federal Respondents have done. They have instead asked the Court to apply the *Chevron* standard in the first instance to the Commission's *Declaratory Ruling* that is the subject of this case. FCC Pet. at I, 15-19 & 24-28; NCTA Pet. at i, 17-21. If the Court is to apply *Chevron* in the first instance, and if *Chevron* is not a rubber-stamp invariably requiring a court to affirm all agency determinations (which it clearly is not), then Cross Petitioners, just as much as the Federal Respondents, are entitled to have their arguments concerning the propriety of the *Declaratory Ruling*'s resolution of the cable modem service classification issue reviewed under the *Chevron* standard.

That is especially true here where the court of appeals' decision with respect to the "cable service" classification suffers from precisely the same defects about which Federal Respondents complain in their petition: (1) the court of appeals decision rejected the "cable service" classification, just as it did the "information service" classification, based solely on what it perceived as the *stare decisis* effect of *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (FCC App. at 16a-22a); and (2) *Portland*, in turn, ruled on the "cable

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[8] *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

service" issue, just as it ruled on the "telecommunications service" issue, without benefit of any briefing by the parties on the issue (Cross Petition at 8; FCC App. at 115a). In other words, *no* court has addressed the merits of Cross Petitioners' "cable service" arguments, or Federal Respondents' "information service" arguments. The only difference between the Federal Respondents' position and ours is that they, unlike we, happen to like the end result of the court of appeals' application of *stare decisis* with respect to the "cable service" issue, although they cannot plausibly agree with the court of appeals' reliance on *stare decisis* to reach that result.

3. Cross-respondents ignore another important reason this Court's review is warranted: The "cable service" classification issue has enormous fiscal implications for the nation's local governments that Cross Petitioners represent. Cross Petition at 24-25. Thus, contrary to NCTA's assertion (NCTA Opp. at 1 & n.1), the issues presented by the Cross Petition do indeed involve governmental or public bodies and the public interest that they represent.[9]

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[9] *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 244 (8th ed. 2002).

II. The *Declaratory Ruling*'s Rationale for Concluding that Cable Modem Service Is Not a "Cable Service" Is Erroneous.

On its face, the plain language of the "cable service" definition encompasses two elements: a downstream element in §522(6)(A) ("the one-way transmission to subscribers of ... other programming service"), and an upstream element in §522(6)(B) ("subscriber interaction, if any, ... required for the selection or use of such ... other programming service"). Like the *Declaratory Ruling* and *Portland*, cross-respondents dwell on the downstream element -- specifically, "one-way transmission" and "other programming service" -- and essentially ignore the upstream element, in the apparent hope it will go away.[10] But even cross respondents' "one-way transmission" and "other programming service" arguments do not withstand reasoned analysis.

1. Assuming *arguendo* that "one-way transmission" in §522(6)(A) means that a cable operator must possess editorial control over content,[11] cross-respondents cannot come to grips

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[10] They do point to the phrase, "if any," in §522(6)(B) for the unremarkable proposition that the upstream element of "cable service" is not "a necessary component" of "cable service." FCC Opp. at 5-6; Earthlink Opp. at 4. But the upstream component is equally clearly a permissible, and thus non-disqualifying, element of "cable service." Cross-respondents' interpretation of "cable service," in contrast, would essentially render that upstream component inoperative.

[11] Even this conclusion requires considerable semantic gymnastics. As used in the Communication Act's definition of "telecommunications," 47 U.S.C. §153(43) (and thus derivatively in its definition of "telecommunication service," 47 U.S.C.

with the fact that the Commission itself has concluded that cable operators do in fact possess such control over cable modem service content. Cross-Petition at 21-22 & n.13. To suggest that operators' editorial decisions not to exploit that control more fully proves the absence of such control is sheer sophistry.

Furthermore, the Commission's conclusion that cable modem service is a non-cable service in its entirety cannot be squared with its concession that cable operators do in fact include in cable modem service "proprietary information or packages of pre-selected web site links" (FCC Opp at 4) and that "discrete parts of cable modem service have characteristics of cable service" (*id.*). Even in the original 1984 "cable service" definition, before its expansion in 1996, Congress unequivocally instructed that if a cable service and a non-cable service are combined in a single offering, that combination does "not transform ... the cable service [component of the offering] into a non-cable service."[12]

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§153(46)), "transmission" connotes the *absence* of editorial control, and the *Declaratory Ruling* under review repeatedly uses the term "transmission" in that way. *See, e.g.*, FCC App. at 96a-98a, 100a & n.195, & 108a. Moreover, "telecommunications service" can be a one-way service -- indeed, even a one-way video service. *See, e.g.*, 47 U.S.C. §571(a)(2). While *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), concluded that "one-way transmission" in §522(6)(A) could be read to connote editorial control, its reasoning is a bit peculiar: While a letter-writer may "send" a letter, 33 F.3d at 71, she does not "transmit" a letter; the Postal Service does.

[12] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("*1984 House Report*").

2. Cross-respondents' claim (FCC Opp. at 5; Earthlink Opp. at 4-5) that cable modem service is not "other programming service" within the meaning of 47 U.S.C. §522(14) likewise misses the mark. The plain and broad language of the "other programming service" definition is clearly subsumed within the "information service" definition,[13] the very same definition that Federal Respondents claim in their petition encompasses cable modem service. And there can be no serious dispute that cable modem service makes available to all subscribers generally "the majority of the information accessed over the Internet" (FCC Opp. at 4), from websites such as CNN.com and ESPN.com to a myriad of other websites that, much like traditional video channels, any subscriber may visit if she chooses.

Cross-respondents' only rejoinder is to point to more personalized "on-line banking information and personal e-mails" (FCC Opp. at 12). But even assuming *arguendo* that these particular applications do not fall within the "cable service" definition, treating them as disqualifying the websurfing bulk of cable modem service from "cable service" would improperly allow the tail to wag the dog. *See* text at note 12 *supra*. Even the Commission has recognized that e-mail is not the *sine qua non* of cable modem service (FCC App. at 95a & n.177).

More fundamentally, cross-respondents overlook the effect of Congress' 1996 expansion of the §522(6)(B)

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[13] *Compare* 47 U.S.C. §522(14) ("*information* that a cable operator makes available to all subscribers generally") *with* 47 U.S.C. §153(20) ("information service" means "the offering of a capability for ... making available *information* via telecommunications") (emphasis added).

upstream component of the "cable service" definition to include "subscriber interaction ... required for the ... *use* of ... other programming service." While it may be true that, prior to this 1996 expansion, such subscriber-specific uses of information accessed from the Internet would disqualify a service from being a "cable service," there is nothing in the plain language of "use" that suggests it does not include subscriber-specific "use," and much that suggests otherwise. *See* Cross Petition at 17-22.

3. Respondent Earthlink (Opp. at 6-7) inadvertently lends further support to Cross Petitioners' position when it correctly quotes the *Declaratory Ruling* as stating that "[t]he legislative history indicates that Congress intended the cable service definition 'to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under [47 U.S.C. §541(c)] and all other communications services that could be provided over a cable system.'"[14] This, of course, means that if, as Federal Respondents contend in their petition, cable modem service is an "information service" and contains no separate "telecommunications service" component, then it falls on the "cable service" side of the boundary that Congress intended the "cable service" definition to draw. It is for this reason that cross-respondents' reliance on *NCTA v. FCC* is misplaced, because there the D.C. Circuit held that video dialtone service was not a "cable service" because it was a form of "video common carriage." 33 F.3d at 70-71. Federal Respondents certainly do not argue here that cable modem service is such a common carrier telecommunications service.

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[14] FCC App. at 120a (quoting *1984 House Report* at 41, 1984 U.S.C.C.A.N. at 4678).

4. In the end, cross-respondents have no reasoned explanation for the clear and unequivocal Congressional intent expressed in the *1996 Conference Report*,[15] the *1984 House Report*, the reference to "information service" in 47 U.S.C. §544(b), or the language in the Internet Tax Freedom Act, other than to urge that these indicia be disregarded. Under *Chevron*, however, these are the very kinds of "devices of judicial construction" that cannot be ignored in construing a statute. *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 1248 (2004). And the only way to read these various devices together "into a harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), is to conclude that cable modem service is a "cable service."

Respectfully submitted,

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[15] H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 182 ("*1996 Conference Report*").